

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EDWARD COWGILL,

Defendant-Appellant.

UNPUBLISHED

February 3, 1998

No. 200700

Berrien Circuit Court

LC No. 96-000649

Before: Gribbs, P.J., and Murphy and Gage, JJ.

PER CURIAM

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct (CSC-3) (sexual penetration using force or coercion), MCL 750.520d; MSA 28.788, and sentenced as a three-time habitual offender, MCL 769.11; MSA 28.1083, to seven to thirty years' imprisonment. Defendant appeals as of right from his conviction and sentence. We affirm.

First, defendant argues that the evidence was insufficient to support his conviction. There is no merit to this argument. The complainant testified that defendant lay on top of her, held her hands above her head and positioned himself so that she could not move or get away while he inserted his penis into her vagina. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Questions of credibility are left to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant also contends that the trial court erred in excluding the testimony of two defense witnesses, who would have testified that defendant told them that he and the complainant had consensual sexual relations before the night of the alleged sexual assault. We agree but find the error harmless in this case. *People v Lucas (On Remand)*, 193 Mich App 298, 299; 484 NW2d 685 (1992). We note that this matter was tried by the court rather than a jury. In its findings of fact, the trial court indicated its awareness of defendant's claim that he and complainant had a history of consensual

sexual activity and the trial court acknowledged that it was possible that there had been a prior sexual relationship. The trial court nonetheless concluded that it found complainant's version of the offense more credible than defendant's. On the facts of this case, we find that exclusion of the defense witnesses was harmless beyond a reasonable doubt.

Finally, defendant argues that his sentence was disproportionate. We do not agree. Although the sentencing guidelines do not apply to habitual offender convictions, defendant's sentence in this case, for habitual-third, was well within the guidelines' range for the underlying offense. Defendant's sentence could have been enhanced to twice the statutory maximum. In addition, defendant was on probation for an unrelated sexual assault at the time of this offense. We find defendant's sentence proportionate to the offender and the offense.

Affirmed.

/s/ Roman S. Gibbs

/s/ Hilda R. Gage